

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BRYANT, et al., : 09-CV-01751
 : (SJF)
 Plaintiffs, : United States Courthouse
 -against- : Central Islip, New York
MILHORAT, et al., : December 2, 2009
 Defendants.
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SANDRA J. FEUERSTEIN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Stephanie Picozzi, RPR
Official Court Reporter

1 THE CLERK: 09-CV-1751 Bryant, et al. v.
2 Milhorat, et al.

3 MR. GOLDSMITH: Lee Goldsmith of Goldsmith,
4 Ctorides & Rodriguez for the plaintiffs, with Mr. Gene
5 Locks of the Locks Law Firm, Ms. Christina Ctorides of my
6 firm and Mr. Knowlton from the Locks Law Firm.

7 MR. SOLA: Anthony Sola from Martin Clearwater &
8 Bell for all defendants except Dr. Roonprapunt (ph). With
9 me is Nancy Block and Rosaleen McCrory.

10 MR. McNABOE: John McNaboe, Heideell Pittoni
11 Murphy & Bach.

12 THE COURT: As far as disclosure of the original
13 medical records of all potential 64 or 54, all claimants,
14 you have already drafted the authorizations or you have
15 already forwarded --

16 MR. GOLDSMITH: All authorizations have been
17 forwarded, as far as I know, on all claims we have filed
18 as well as claims that we are planning to file.

19 THE COURT: I would ask you by the end of today
20 to go over your potential claimant list, make certain that
21 all authorizations have indeed been sent to them and then
22 the defendants will have six weeks to produce the original
23 records for you.

24 MR. SOLA: I presume they want copies first,
25 then they want a period at the end of the six weeks in

1 which they can come to our office to review the originals.⁴

2 I presume we will not return the originals over to them.

3 MR. GOLDSMITH: That's fine. I will provide to
4 Mr. Sola a list of what we are missing in other records.
5 But we do know that we have been denied access to certain
6 records which has been -- Mr. Sola has been advised of
7 such as billing records.

8 MR. SOLA: Let me be clear about this. We have
9 made it clear to them that on those cases they have not
10 yet brought a lawsuit, they are only investigating to see
11 whether or not there is merit, that it is inappropriate to
12 give them billing records. Billing records have nothing
13 to do with their analysis whether or not there are
14 departures and causation of injury. Once they are in
15 suit, of course then, pursuant to normal discovery, they
16 would get billing records.

17 THE COURT: Your response?

18 MR. GOLDSMITH: We had --

19 THE COURT: What is the importance of the
20 billing records?

21 MR. GOLDSMITH: The billing records have shown
22 and we will be following one additional discovery, the
23 surgeons saying they were present at the surgery are not
24 the ones billing for the surgery.

25 THE COURT: What does that have to do with the

1 untethering claims?

2 MR. GOLDSMITH: It may be Drs. Milhorat and
3 Bolognese are the ones billing for the tethering but not
4 doing the tethering.

5 THE COURT: We are only talking about the
6 untethering or is this going to the common law fraud?

7 MR. GOLDSMITH: It goes to the common law fraud
8 and the entire case. But the question of billing, the
9 question of billing records came up before your Honor
10 isolated the untethering.

11 THE COURT: Would you agree that now having
12 isolated the untethering claims, the billing records are
13 not necessarily appropriate for the other 40 unless you
14 are certain they are going to be claimants?

15 MR. GOLDSMITH: The answer to that is yes, I
16 would agree.

17 THE COURT: Let's put it this way. They have
18 six weeks to give you the records, then you will go to
19 their offices and go over the originals. When you have
20 made a certification as to which claimant will actually be
21 part of this suit as far as at least the untethering
22 claims for my purposes, you will then notify the
23 defendants and they will in fact give you the billing
24 records. Yes?

25 MR. SOLA: That's fine.

1 THE COURT: Let's set up a time period for that. ⁶

2 MR. SOLA: I presume we are talking about six
3 weeks to give them the copies and make available to them
4 the originals from the date they give us -- that we
5 receive a list of cases.

6 THE COURT: Yes, of course.

7 MR. GOLDSMITH: There is other information that
8 will relate to the tethering claims that we have not
9 received.

10 THE COURT: Give me an idea.

11 MR. GOLDSMITH: We know that there are extensive
12 e-mails between many of our patients and many -- and the
13 defendants. They relate to the procedures that were done
14 and recommendations relating to the procedures.

15 THE COURT: These predate the surgeries?

16 MR. GOLDSMITH: And yes, and postdate. They pre
17 and postdate the surgeries. There are multiple e-mails we
18 have received, some from our clients who retained the
19 e-mails but received none of these e-mails from the
20 defendants.

21 THE COURT: You requested them?

22 MR. GOLDSMITH: We requested the entire medical
23 records relating to these patients.

24 THE COURT: I wouldn't necessarily categorize
25 those as medical records. And I would say this, first of

1 all, I'm going to caution the defendants to hold on to all
2 of the computer records and so forth because you don't
3 want to be charged with expoliation and let's then get a
4 list from your clients as to e-mails and then we can match
5 them up with what they have.

6 MR. SOLA: This goes to discovery, of course,
7 which I would presume will occur after we have answered
8 and after we have had an appearance before Magistrate
9 Judge Tomlinson.

10 THE COURT: Correct. I'm trying to sort of
11 expedite things. I think we have to do this in an orderly
12 fashion. It's going to be a big deal. So I think we have
13 to make it as simple and as step-by-step as we possibly
14 can.

15 Are we clear now, it's six weeks they have to
16 respond from the date you get them the whole list.

17 MR. SOLA: Just the medical records?

18 THE COURT: The medical records.

19 They are also going to give you a list of e-mail
20 things but you can do that with Judge Tomlinson. You
21 don't need me for that.

22 MR. GOLDSMITH: Yes.

23 THE COURT: Let's go on then.

24 Objection 1. Now, the plaintiffs have listed
25 three questions that they want to be resolved as far as an

1 initial determination with regard to the following central
2 issues. One was tether cord surgery and acceptable
3 scientifically supported treatment.

4 Would you agree that's an issue to be resolved?

5 MR. SOLA: I object. No, that is not something
6 which is specifically stated in their complaints. This is
7 muddling. And with all due respect to plaintiff's counsel
8 which is muddling the issues, the specific allegation,
9 factual allegation, which your Honor culled from the
10 preliminary statement is what they said, experimental.

11 THE COURT: But are we not --

12 MR. SOLA: That then becomes, your Honor, a
13 classic malpractice case, not acceptable, then you get
14 departures and case specific.

15 THE COURT: I can't quite totally agree with
16 that because isn't the question of experimental one of
17 scientific acceptance or not? If something is not
18 scientifically accepted, can't we say it's experimental?

19 MR. SOLA: With all due respect, actually, no.

20 THE COURT: Don't keep saying "with all due
21 respect." It's understood.

22 MR. SOLA: I apologize.

23 This is one of those issues, the definition of
24 experimental, which on its face seems easy, when you get
25 down into it and drilling down into it, it's actually very

1 complicated, what experimental is and what it is not.

2 If you are looking at the issues as he couched
3 it, whether or not it was a deviation from accepted
4 practice, then it's very case specific and you have to get
5 into the individual patient's background.

6 THE COURT: No. I disagree. I think the
7 question is obviously -- that's a question of general
8 medical malpractice. If a particular patient was advised
9 to have a particular surgery and it wasn't appropriate for
10 that person's case, that's medical malpractice. But if
11 the whole procedure, which I believe plaintiffs are
12 claiming, had no scientific foundation for being applied
13 in any case, then it's experimental.

14 MR. SOLA: That's why the issue should be
15 experimental. I suggest that the whole point of this is
16 to make a few issues as possible, to consolidate it to as
17 narrow an area as possible.

18 THE COURT: I want to hear the specific
19 objection to question 1 as formulated by the plaintiffs,
20 what you object to because to me that's saying is it
21 experimental and they say was tethered cord surgery an
22 acceptable scientifically supportable treatment.

23 MR. SOLA: It subsumes experimental,
24 Experimental covers that as well then. So phrase the
25 question the way it was in their complaint which is was

1 this experimental surgery. That's the question.

2 THE COURT: Do you agree if it was not
3 scientifically acceptable, then it was experimental?

4 MR. SOLA: I really am not prepared at this
5 point based upon what I have read already on how difficult
6 it is to define experimental to give an answer to that
7 question, your Honor.

8 THE COURT: To me this is the definition; if
9 it's not acceptable, it's experimental.

10 MR. SOLA: I'm not quite sure I feel comfortable
11 at this point saying yes or no. But I have no problem
12 with what was stated in the complaint, the allegation,
13 that it be experimental, that that be the issue, that that
14 be the framed issue.

15 THE COURT: I can't let it be if I'm deciding 40
16 cases at once or more whether it was experimental as to an
17 individual person. It can only be whether in any case it
18 would be scientifically acceptable.

19 MR. SOLA: We agree that -- but what you are
20 doing by taking that language of plaintiff's counsel, you
21 are beginning to come up with a definition of
22 experimental.

23 THE COURT: I think it's one factor.

24 MR. SOLA: It may be a factor but it's not
25 exclusive. I think a lot of this trial will be about the

1 definition of what is experimental.

2 THE COURT: I think you will have an opportunity
3 to add other questions that may lead to the determination
4 as to whether something is experimental or not but
5 certainly this is one thing to be considered.

6 MR. SOLA: I am not prepared to agree with that
7 statement, especially when that is not a specific
8 allegation in their complaint as written so far.

9 THE COURT: I'm not concerned about that because
10 complaints by the time we get to trial may have a very
11 different -- the whole case may have a different outlook.

12 MR. SOLA: The question of whether it's
13 experimental is one that clearly cuts across all the
14 cases. So if the issue is framed --

15 THE COURT: Does it?

16 MR. SOLA: Their allegation is it's experimental
17 and we don't disagree that that is their allegation and
18 it's their allegations.

19 THE COURT: How do you determine if something is
20 experimental? What would you consider?

21 MR. SOLA: That is going to be the subject of
22 expert testimony and commentary, as to the definition of
23 experimental in surgical practice. There is going to be a
24 lot of time for debating that at trial.

25 I don't it's appropriate for me at this point to

1 come up with what my sort of general concept of
2 experimental might be. I don't think it's relevant.

3 The issue is -- there is no question in every
4 single one of his complaints in the preliminary statement
5 he claims factually it was experimental. That is an
6 appropriate issue to cull out to streamline for the jury.

7 THE COURT: You made your point. But I think
8 that this is definitely at the very least a factor,
9 whether it was a scientifically acceptable supportable
10 treatment for this condition.

11 MR. SOLA: So I'm clear on the record, I think
12 that that if the Court is now going to define
13 experimental, I don't think that's a function for the
14 Court. I think it's a subject of expert testimony and
15 will be ultimately a jury question. So I don't think --

16 THE COURT: And the question is going to be --
17 one of the questions is going to be was it scientifically
18 supportable for this. So I definitely think it's a
19 factor. There may be other factors, I certainly agree
20 with that, but I certainly think this is one and it will
21 be a question that that will have to be addressed.

22 You are telling me it will be addressed because
23 you are saying you are going to be bringing in experts who
24 will testify this was indeed an acceptable scientific
25 approach.

1 MR. SOLA: We have to first decide what the
2 issue is before we decide what experts we are bringing in.

3 THE COURT: Whether it was experimental or not.

4 MR. SOLA: I agree that should be the issue, is
5 it experimental.

6 THE COURT: This will definitely be a
7 consideration. You have your exception but it's
8 definitely going to come into it.

9 Their second question is, was it a deviation
10 from accepted standards of medical care to perform
11 tethered cord surgery in any patient. Now, that I
12 disagree with because to me, that is a question that is
13 very patient specific so I would definitely take that
14 question out. I don't think that's appropriate for this
15 determination.

16 MR. GOLDSMITH: Your Honor, that question can
17 easily be modified by removing "any patient."

18 THE COURT: I don't think that that takes care
19 of it because then the question is --

20 MR. GOLDSMITH: Generally.

21 THE COURT: You can't speak generally.

22 MR. GOLDSMITH: Your Honor, the initial order
23 took a look at the 14 cases and separated those 14. In
24 those 14 cases, we basically have in those cases, I know
25 them fairly well factually individually, all the various

1 varieties of their claims of performing tethered cord
2 surgery and the reasons for performing as they published
3 in the literature. Those 14 cases and my response here in
4 a patient in general, not a specific patient, but in a
5 patient at all generally --

6 THE COURT: It has to be a specific patient.
7 Every patient -- supposing someone has a pacemaker, it
8 might enter into it or if someone has other medical -- I
9 don't know what's the plural is of apparatus.

10 MR. GOLDSMITH: The materials. And that goes
11 into discovery, obviously, but the materials that they
12 have written on, the subject clearly delineates their
13 reasoning for --

14 THE COURT: Who is "they"?

15 MR. GOLDSMITH: Dr. Milhorat in one of his
16 publications and the other author. So I have read all
17 their materials.

18 THE COURT: I'm still not convinced.

19 Go ahead.

20 MR. GOLDSMITH: So I'm referring to that.

21 In trying to formulate this question, I did not
22 mean in the sense of the specific patient but the Chiari
23 patient.

24 THE COURT: People have other things. To me
25 this goes to your malpractice claims. I don't want that

1 to be decided here. But you have your exception.

2 Now we are one for one.

3 Number 3, the defendants' website, their
4 advertising and activities. Well, that goes to the common
5 law fraud claim.

6 MR. SOLA: In part.

7 MR. GOLDSMITH: In part.

8 MR. SOLA: Yes.

9 THE COURT: Do you have a problem?

10 MR. SOLA: Yes. That gets to our motion. I
11 submit the motion on the common law fraud is a pure
12 factual -- not factual, legal issue. We are assuming for
13 the purposes of that motion all the allegations of the
14 plaintiff's complaint, we submit that should be decided
15 just as a matter of law before we get into wasting time
16 with discovery, wasting time if we prevail, as we believe
17 we would on the law. There would be no point in having
18 discovery.

19 THE COURT: Let's take the scenario that you
20 don't make such a motion or on the common law fraud so it
21 will be there and if you make your motion and the motion
22 is decided, then that will take out --

23 MR. SOLA: Your Honor, if we are looking at the
24 basic purpose of this, to streamline and speed things up,
25 if we do the motion first as opposed to afterwards, we

1 save all that discovery.

2 THE COURT: I'm going to probably refer that to
3 Judge Tomlinson so I will leave it to her whether or not
4 she wants to deal with -- how she wants to deal with it.

5 MR. SOLA: With the pre answer motion for the
6 fraud?

7 THE COURT: Correct.

8 MR. SOLA: However, getting back to the main
9 purpose of this whole consolidation, I suggest as we
10 indicated in our initial response that the outcome of the
11 first critical issue here will pretty much tell the story
12 for a lot of the cases and will expedite things. This is
13 an unnecessary one. If for example a jury finds the
14 defendants have been engaging in experimental surgery, my
15 clients will probably have to rethink what their position
16 is. Similarly, if the jury finds it was not experimental,
17 the plaintiffs will have to rethink. I think this adds
18 another whole layer of discovery, a tremendous amount of
19 discovery and litigation.

20 THE COURT: Well, you have your motion out
21 there, right?

22 MR. SOLA: This is not just common law fraud.
23 It also goes to false advertising, a separate cause of
24 action under the New York State general business law.

25 THE COURT: Where are you with the motion?

1 MR. SOLA: We made them on those cases we are
2 allowed to. We have asked for the judge's permission to
3 make them in the cases where they don't want the motion.

4 THE COURT: Has the opposition been served?

5 MR. SOLA: Yes.

6 THE COURT: They are fully briefed?

7 MR. SOLA: No; they have not responded yet.

8 THE COURT: That's what I said. Is there
9 opposition?

10 MR. GOLDSMITH: No.

11 THE COURT: I just said, you made the motions?

12 MR. SOLA: We made the motions.

13 THE COURT: Have you opposed the motions yet?

14 MR. GOLDSMITH: No.

15 THE COURT: When is your opposition due?

16 MR. GOLDSMITH: In some of the cases plaintiff's
17 opposition has gone in. In your Honor's initial ruling,
18 we were of the opinion the motions had been stayed in all
19 the cases and so there is a question in our mind what do
20 we do with these motions, when are their answers due. We
21 are in limbo on that at this point in time so we don't
22 know.

23 MR. SOLA: I misspoke when I said there was no
24 opposition. There is some opposition.

25 THE COURT: Let me ask you this, will the

1 determination of whether or not this procedure, the
2 untethering, is experimental be a factor in determining
3 whether there has been misrepresentation?

4 MR. GOLDSMITH: I would think.

5 MR. SOLA: Not relevant to the common law fraud.

6 MR. GOLDSMITH: If your Honor goes with the
7 initial question which is accepted which I basically look
8 at as a Dalbert type of question --

9 THE COURT: So do I.

10 MR. GOLDSMITH: -- the answer to that is no,
11 because if that question gets resolved, then it can be
12 placed in with the questions of the common law fraud or
13 the other questions. So from a scientific point of view,
14 the answer from plaintiff is no.

15 THE COURT: See, I don't know because it would
16 seem to me if there is no scientific basis for this type
17 of surgery then and they were aware of it, then that leads
18 into the determination of whether there was common law
19 fraud.

20 MR. GOLDSMITH: Tell me why not.

21 MR. SOLA: That's the basis for our motion.

22 THE COURT: You agree on this?

23 MR. GOLDSMITH: No.

24 MR. SOLA: Common law fraud, your Honor, cannot
25 reside together with a medical malpractice case. You have

1 to have separate and distinct -- it's strictly a matter of
2 law they cannot seek a common law fraud in a case like
3 this.

4 THE COURT: Why is this?

5 MR. SOLA: It's in our briefs.

6 THE COURT: I haven't read them yet.

7 MR. SOLA: Because basically for common law
8 fraud to exist with medical malpractice, the fraud has to
9 be distinct, rather, the damages have to be distinct and
10 separate from the medical malpractice. And we had almost
11 the exact same case in the Eastern District a year or two
12 ago. The exact same issue was decided and there is a long
13 line of cases indicating that you cannot have common law
14 fraud together with medical malpractice in a case such as
15 this.

16 THE COURT: I think you should respond to the
17 motion and we will see whether the determination of that
18 motion will be held in abeyance or not and I will look at
19 the papers and see, when I have seen everything there,
20 whether I think it should be or not. I'm sorry if you
21 think it wastes time. I can't see doing it any other way.

22 MR. SOLA: My only point, we have 14 different
23 cases in front of a lot of different judges on this
24 motion. Perhaps what would be appropriate, we might both
25 agree to have that motion heard before one judge for all

1 the cases.

2 THE COURT: You want me to take that part too?
3 I have no problem with that.

4 MR. GOLDSMITH: We have no objection to that.

5 THE COURT: That's fine.

6 Off the record.

7 (A discussion was held off the record.)

8 THE COURT: I'm going to ask you at the end of
9 the day here, hopefully we won't go to the end of the day,
10 when we are done, if you would formalize a new order.

11 MR. SOLA: Proposed order to submit?

12 THE COURT: Proposed order to submit.

13 I will do those two, 1 and 3. Let's move along
14 then.

15 MR. SOLA: You said 1 and 3. I thought we were
16 disputing 3 was not going to be included now.

17 THE COURT: It's not going to be included. It's
18 a separate motion but I will decide it. I wouldn't
19 include it in the order. I'm taking that away from the
20 other cases.

21 MR. SOLA: Understood.

22 THE COURT: Now, I have already told you that I
23 do think that all 40 should be decided together as to
24 these issues so while you have your objection and your
25 exception, win a few, lose a few.

1 MR. GOLDSMITH: It's no objection. It's no
2 exception, your Honor. We will comply.

3 THE COURT: Objection number 3.

4 MR. SOLA: For clarity on that point, are you
5 going to set a time frame within which for them to file?

6 THE COURT: How long do you need to file
7 opposition to the motion? This is on the fraud.

8 MS. CTORIDES: Some of the affirmations in
9 opposition have already been submitted.

10 THE COURT: We have to get out the order. The
11 first step is to get out the order so I get those from the
12 other judges.

13 Can you work that out?

14 MR. SOLA: Yes. What I was talking about, the
15 time in which they have to file the 40 odd cases.

16 THE COURT: If they don't want to file certain
17 of the cases after they have gone over the records, they
18 don't have to. Let's give them four months.

19 Is four months enough?

20 You have six weeks to go through the records and
21 then another four months from then or three months from
22 then.

23 MR. LOCKS: There are two issues. Every case
24 has to be reviewed by and will be reviewed by what we
25 consider to be legitimate physicians to give us an opinion

1 on that case. There are only a certain number of
2 physicians we are at the point now --

3 THE COURT: How much time do you need?

4 MR. GOLDSMITH: Your Honor, I will move as
5 expeditiously as I can.

6 THE COURT: How much time do you need?

7 MR. GOLDSMITH: I will need at least the four
8 months. I may come back and request additional time.

9 THE COURT: Fine.

10 MR. GOLDSMITH: I can't be better than that.

11 THE COURT: That's fine.

12 MR. LOCKS: There is a moving target. Some of
13 these may for some reason require a little additional time
14 and for some reason --

15 THE COURT: Let us know. You think the
16 defendants are in a rush to get to trial?

17 MR. LOCKS: There may be some new people.

18 THE COURT: I have yet to meet the defendant who
19 is in a hurry.

20 Number 3, no one wants to, least of all myself,
21 consolidate these cases in toto. That was never an issue.

22 Objection 4.

23 MR. SOLA: On plaintiff's question 4 --

24 THE COURT: I think we are in agreement that the
25 whole question to be decided initially is was this

1 experimental, that's it.

2 MR. SOLA: That's not a determination of
3 liability.

4 THE COURT: Certainly not.

5 MR. SOLA: The trial would have to resume for
6 each individual case, both liability and damages.

7 THE COURT: And with each individual judge as to
8 medical malpractice.

9 MR. SOLA: Discovery for each one of those as
10 well.

11 THE COURT: Absolutely.

12 MR. SOLA: Understood.

13 THE COURT: You can always make your motions.
14 As far as objection 6 -- what happened to 5?

15 MR. SOLA: We have no objection to that.

16 THE COURT: We are all in agreement I will do --
17 someone, probably me, will do the pretrial discovery for
18 all the cases. Well, let's see what happens with the
19 initial first. Let's see what happens. If we weed out
20 some and then, you know, it may be I will take them for
21 the trials. I don't know. We will see what is left.

22 Number 6.

23 MR. SOLA: All cases will be stayed for the time
24 period they file.

25 THE COURT: Absolutely. Plaintiffs do not

1 object to the stay of the other causes of action.

2 Defendants vehemently object. You can always move.

3 MR. SOLA: Which one?

4 THE COURT: Number 6.

5 MR. SOLA: We have addressed that we are going
6 to be able to make our single common law motion.

7 THE COURT: That's fine.

8 We are up to number 7. I think you are in
9 agreement.

10 MR. GOLDSMITH: We are.

11 MR. SOLA: Yes.

12 THE COURT: Let's do 8 and 9.

13 MR. SOLA: 8 I think we have taken care of.

14 MR. GOLDSMITH: 8 we have taken care of.

15 THE COURT: And 11.

16 MR. GOLDSMITH: That's the common law fraud.

17 THE COURT: We have decided that.

18 MR. SOLA: Can we go back to number 3? That was
19 our issue about at trial, selecting or a severed single
20 issue which cuts across all the cases. We are just
21 raising it now. You may want to rule at a later time.

22 THE COURT: Please direct me.

23 MR. SOLA: Number 3 where we raise the issue
24 that --

25 THE COURT: Consolidating everything.

1 MR. SOLA: At the severed trial of the single
2 issue of the untethering, not all plaintiffs in 50 cases
3 be allowed to be in the courtroom during the trial during
4 the trial of that action.

5 THE COURT: Let's wait and see when we get to
6 the trial. Why wouldn't they be allowed here?

7 MR. SOLA: We agree they shouldn't be allowed.

8 THE COURT: Why wouldn't they be allowed?

9 MR. SOLA: It's a single issue that cuts across
10 all the cases. It would be a terrible impression to the
11 jury if they see 50 plaintiffs on the one issue. It's
12 prejudicial and their individual cases are irrelevant to
13 that issue. It should be a single representative person.
14 It's not consolidated.

15 THE COURT: You will have to brief that.

16 MR. SOLA: It's not a class action.

17 THE COURT: You will have to brief that. I'm
18 not inclined to -- if this is an issue that's relevant to
19 anyone's claim, I'm not inclined to foreclose them from
20 listening to what is going on. This is an open courtroom.

21 MR. SOLA: We can have people from the defense
22 side here too as long as it's in the open courtroom
23 setting. They can sit in the background. But the jury
24 should not be told. This is the exception that lists all
25 50 names. That would be inappropriate I would submit.

1 MR. GOLDSMITH: Isn't it premature?

2 THE COURT: I think.

3 MR. SOLA: I mentioned it at the beginning
4 because it may be something to handle at a later date.

5 THE COURT: You have noted it. We know it's on
6 the horizon but I'm going to need some law on that issue,
7 for prejudice and so forth.

8 Anything else?

9 MR. GOLDSMITH: One other, just a thought. No
10 answers have been filed in any of these cases because of
11 the pending motions. I will assume that pursuant to
12 briefing schedule, the answers will be due immediately
13 thereafter, after the motions are decided.

14 MR. SOLA: Whichever judge or your Honor decides
15 that will indicate when the answers are due.

16 THE COURT: That's generally the way it works.

17 MR. SOLA: May I then add, your Honor, that
18 Magistrate Judge Tomlinson set a discovery conference for
19 the 15th, we haven't answered yet. We now have this
20 motion that is going to go first. I would think that
21 would be basically pointless at this point to have that.

22 THE COURT: The conference?

23 MR. SOLA: Where we will have a delay.

24 THE COURT: We can contact her.

25 MR. GOLDSMITH: Your Honor, I don't see it as

1 pointless. Your Honor has decided to follow basically
2 question 1 and we could have that conference. We prepared
3 for the conference.

4 THE COURT: Just as to question 1?

5 MR. GOLDSMITH: Just as to question 1.

6 THE COURT: I have already laid out your
7 discovery, the hospital records. What else do you need?
8 You need depositions?

9 MR. GOLDSMITH: Yes.

10 THE COURT: Then you are going to have to go to
11 her. Let's give her an encapsulated order to determine
12 discovery in the case but only on the question of whether
13 or not -- unless the surgery was experimental, only on
14 that issue, discovery will proceed and I will send it to
15 her for that purpose.

16 What did you want to say?

17 MR. SOLA: Okay. Because we have to submit to
18 you a proposed order here now.

19 THE COURT: The order comes first. We can't do
20 anything without the order.

21 MR. SOLA: That's not going to happen, I would
22 think, getting it to you and getting your response by the
23 15th.

24 THE COURT: All right. I see. We can delay.
25 Let's call Judge Tomlinson and ask her, Bryan, if we can

1 adjourn it. But you will get it to me soon, an order.

2 MR. SOLA: Proposed order to you. A week to get
3 it to you?

4 THE COURT: Sure. The week brings us to the
5 15th just about. Make it right after the New Year.

6 Does that work?

7 MR. GOLDSMITH: That's fine.

8 In this proposed order, may we quote question 1
9 from the plaintiff?

10 THE COURT: Including but not limited to.

11 MR. GOLDSMITH: Tethered cord.

12 THE COURT: Included but not limited to.

13 MR. SOLA: Now I'm not following.

14 THE COURT: Experimental, the question -- the
15 issue will be including whether.

16 MR. SOLA: But not limited to.

17 THE COURT: Their number 1. Then you can add
18 other things. Send it back and forth and knock each
19 other's heads. Hopefully by the time you get to Judge
20 Tomlinson, you will have an order I have signed that will
21 give her an idea of what I'm asking her to do.

22 Okay?

23 MR. GOLDSMITH: Thank you.

24 THE COURT: Have a great day and fabulous
25 Christmas.

1 MR. LOCKS: Do we have to confer with Judge
2 Tomlinson? Is the 15th off?

3 THE COURT: We will confer.

4 MR. SOLA: One thing my colleague pointed out.
5 Her discovery order on things like e-mails, etcetera, is
6 going to be pointless until we have all the cases filed.

7 THE COURT: You can start them.

8 Look, you can't use the e-mails from a case
9 that's not filed in another case, that's clear. So I
10 think -- gosh, the temptation is there when you see an
11 e-mail but that case isn't filed so let's only do it for
12 the cases that are filed. I don't want any random e-mails
13 out there floating around from other.

14 MR. SOLA: They won't be relevant to this issue.

15 THE COURT: They may or may not be. I don't
16 want someone's personal e-mail to be utilized in a way
17 that doesn't affect a particular cause of action for them.

18 MR. GOLDSMITH: To expedite matters, we have
19 authorizations and have supplied authorizations rather
20 than saying just the cases filed, the cases in which
21 authorizations have been supplied to the defendants.

22 THE COURT: Does that work?

23 MR. SOLA: Sorry, I missed that.

24 THE COURT: The e-mails for the cases for which
25 authorizations have been issued.

1 MR. SOLA: There are different defendants. They
2 don't have the same defendants in every case. There are
3 some that are the same.

4 THE COURT: You will have to --

5 MR. SOLA: This is really not doing it in a
6 procedurally, orderly way. First you have a complaint,
7 then an answer, then you have discovery conference. There
8 is a reason for that.

9 THE COURT: We are trying to expedite.

10 MR. SOLA: I understand that.

11 THE COURT: I'm wondering how would the e-mails
12 be relevant to the question of whether it's experimental?

13 MR. GOLDSMITH: If the e-mail showed the doctor
14 said it's part of an experiment, it becomes very relevant.
15 We will be able to present testimony to that effect, your
16 Honor.

17 THE COURT: E-mails that --

18 MR. GOLDSMITH: The doctor said it's an
19 experimental procedure.

20 THE COURT: Well, that would definitely be
21 relevant. How are you going to tailor the request?

22 MR. GOLDSMITH: For e-mails?

23 THE COURT: As opposed to every e-mail that was
24 sent by every defendant to your client.

25 MR. GOLDSMITH: Well, the way we have seen the

1 e-mails we have gotten from our clients, they all come
2 from the Chiari Institute and should be part of the record
3 for the individual patient.

4 THE COURT: So it would be in that complete
5 record?

6 MR. GOLDSMITH: Should be part of their record
7 or maintained under separate file.

8 THE COURT: I don't know if that's maintained as
9 a medical record.

10 MR. GOLDSMITH: I have never seen as many
11 e-mails in my life from any medical source that I have
12 from this institute. But I'm saying if it's done as we do
13 in a law office, every e-mail is associated with a
14 specific file.

15 THE COURT: Of course. But the question is is
16 it relevant in the medical file to put an e-mail. Do
17 e-mails go into medical files?

18 MR. SOLA: There is no rule in medical
19 recordkeeping about putting e-mails.

20 THE COURT: Where are they kept? Are they kept
21 in a separate file or you don't know?

22 MR. SOLA: Don't know.

23 THE COURT: Find out if they are in the medical
24 files; it's part of what they get.

25 MR. SOLA: We'll turn whatever we have in the

1 medical chart and turn over.

2 THE COURT: Not the medical chart. If it's in
3 the patient's medical file.

4 MR. SOLA: I'm using that term interchangeable.

5 THE COURT: You are all officers of the Court.
6 I think when they come over and look at the original files
7 -- I would say this. Don't send the e-mails with the
8 initial records but when they come to your offices to see
9 the medical records, have those e-mails there so that you
10 are all there, you all see them and you can go through
11 them and see which ones would be relevant to this
12 particular issue and you can go through them that way.
13 That's fair.

14 Have a great day. Great holidays. Happy New
15 Year.

16 (The conference was concluded.)
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